



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2005

Ms. Shelly O'Brien Yeatts
Assistant District Attorney
Dallas County Criminal District Attorney's Office
Frank Crowley Courts Building
133 North Industrial Boulevard, LB-19
Dallas, Texas 75207-4399

OR2005-02543

Dear Ms. Yeatts:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220723.

The Dallas County Criminal District Attorney's Office (the "district attorney") received a request for copies of the district attorney's case files in cause numbers F99-54382, F01-48587 and F02-01234. You state that the district attorney has been unable to locate a separate prosecution file for cause number F99-54382.¹ You claim that some of the information is not subject to the Act. You also claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.111, 552.117,

¹ We note that the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Furthermore, the Act does not require a governmental body to answer questions or perform legal research. *See* Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990).

552.1175 and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample of information.²

Initially, we note that the submitted information includes arrest warrants and arrest warrant affidavits. Article 15.26 of the Code of Criminal Procedure provides:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Crim. Proc. Code art. 15.26. Thus, arrest warrants and arrest warrant affidavits are made public by, and must be released under, article 15.26 of the Code of Criminal Procedure. As a general rule, the exceptions to disclosure found in the Act do not apply to information made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrants and arrest warrant affidavits that we have marked must be released in accordance with article 15.26 of the Code of Criminal Procedure.

The remaining information is subject to section 552.022 of the Government Code, which provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The remaining information includes a completed investigation. Although the district attorney claims sections 552.103 and 552.111 for portions of this information, these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision Nos. 677

² We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive Gov't Code § 552.103), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 may be waived). As such, sections 552.103 and 552.111 do not constitute "other law" that makes information confidential. Therefore, the district attorney may not withhold any portion of the remaining submitted information under section 552.103 or section 552.111 of the Government Code.

We note that the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are "other law" within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). The Texas Rules of Civil Procedure, however, only apply to "actions of a civil nature." TEX. R. CIV. P. 2. Accordingly, rule 192.5 does not apply to the criminal matter at issue here and no portion of the remaining information may be withheld on this basis. However, since section 552.022(a)(1) provides that information made public under that section may be excepted from disclosure under section 552.108 of the Government Code, we will address the district attorney's section 552.108 claim as it pertains to the remaining submitted information. Furthermore, because sections 552.101, 552.117, 552.1175 and 552.130 of the Government Code constitute "other law" for purposes of section 552.022, we will also address these provisions for the remaining submitted information.

Section 552.108 provides, in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(4) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) represents the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(4). When a request essentially seeks the entire prosecution file, the information is excepted from disclosure in its entirety pursuant to the holding in *Curry v. Walker*, 873 S.W.2d 379 (Tex. 1994) (discovery request for district attorney's entire

litigation file may be denied because decision of what to include in file necessarily reveals prosecutor's mental impressions or legal reasoning). In this instance, we agree that the records request encompasses the district attorney's entire case files. *Curry* thus provides that the release of the remaining information would reveal the district attorney's mental impressions or legal reasoning. Thus, we find that subsection 552.108(a)(4) of the Government Code applies to the remaining submitted information.

Although you claim that basic information about an arrested person, an arrest, or a crime should be excepted from disclosure on the grounds that *Curry* extends to the entire litigation file of the district attorney, we note that section 552.108 does not except basic information from disclosure. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). In Open Records Decision No. 127 (1976), this office summarized the types of information made public pursuant to *Houston Chronicle*, including an arrestee's social security number. *See* Open Records Decision No. 127 at 4 (1976). Thus, with the exception of basic information, the remaining submitted information may be withheld under section 552.108.³

Although an arrestee's social security number is basic information, it must be withheld in some circumstances under section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information other statutes make confidential. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the district attorney must release the marked arrest warrants and arrest warrant affidavits pursuant to article 15.26 of the Code of Criminal Procedure. With the exception of basic offense and arrest information, which must also be released, the district attorney may withhold the remaining submitted information pursuant to section 552.108 of the

³ As we reach this conclusion under section 552.108, we need not address your remaining arguments against the disclosure of this information.

Government Code. Social security numbers of arrestees may be excepted under section 552.101 in conjunction with federal law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc Barenblat", with a long horizontal flourish extending to the right.

Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jev

Ref: ID# 220723

Enc: Submitted documents

c: Ms. Heather J. Barbieri
Attorney at Law
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(w/o enclosures)